STATE OF MICHIGAN

IN THE SUPREME COURT

COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID (CAP), AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN (ACLU), MICHIGAN PARENTS FOR SCHOOLS, 482FORWARD, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, MICHIGAN ASSOCIATION OF SCHOOL ADMINISTRATORS, MICHIGAN ASSOCIATION OF INTERMEDIATE SCHOOL ADMINISTRATORS, MICHIGAN SCHOOL BUSINESS OFFICIALS, MICHIGAN ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, MIDDLE CITIES EDUCATION ASSOCIATION, MICHIGAN ELEMENTARY AND MIDDLE SCHOOL PRINCIPALS ASSOCIATION, KALAMAZOO PUBLIC SCHOOLS, and KALAMAZOO PUBLIC SCHOOLS BOARD OF EDUCATION,

Plaintiffs-Appellants,

v.

STATE OF MICHIGAN, GOVERNOR, DEPARTMENT OF EDUCATION, and SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants-Appellees.

Docket No. 158751

Court of Appeals No. 343801

Court of Claims
LC No. 17-000068-MB
Hon. Cynthia Diane Stephens

_____/

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' APPLICATION FOR LEAVE TO APPEAL

[CAPTION CONTINUED ON NEXT PAGE]

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I. INTRODUCTION

Defendants' opposition brief only confirms the need for this Court's review. In an effort to defend the Court of Appeals majority's analysis of Const 1963, art 8, § 2 and this Court's precedents interpreting it, Defendants grossly mischaracterize Plaintiffs' arguments. Plaintiffs hardly advocate an interpretation of art 8, § 2 that would result in the "withhold[ing of] police and fire protection from [the state's] children." (Defs' Opp Br at 17). Plaintiffs simply ask the Court to recognize—as did the Court of Claims and the Court of Appeals dissent—that art 8, § 2 plainly prohibits the sort of direct public funding of private schools for which MCL 388.1752b provides.[1]

II. ARGUMENT

A. This Court's review is not premature.

Defendants are wrong when they assert that this case is not currently positioned for the Court's review. Defendants maintain that the case is "in the same place" as when the Court "declined to take this case" in October 2016, but that is incorrect. (Defs' Opp Br at 14). At the time, the Governor had merely asked the Court to issue an *advisory opinion* on MCL 388.1752b's constitutionality. *In re Request for Advisory Opinion Regarding Constitutionality of 2016 PA 249*, 500 Mich 875; 885 NW2d 480 (2016) (emphasis added). In other words, there

[1] As an aside, there is no merit to Defendants' gratuitous attacks on the way the Court of Claims handled this case procedurally. Defendants assert that the Court of Claims violated MCR 3.310 in granting Plaintiffs' motion for a temporary restraining order, and that its preliminary injunction order was "conclusory." (Defs' Opp Br at 8-9). Yet, this Court denied Defendants' emergency application for leave to appeal entry of the preliminary injunction. At any rate, since this appeal concerns the Court of Claims' entry of a final judgment on the merits, the preliminary injunction proceedings are irrelevant. Nor is there any merit to Defendants' suggestion that the Court of Claims should not have granted Plaintiffs' motion to amend their complaint in order to verify it as required by MCL 600.6431. (*Id*. at 11). First of all, it was entirely appropriate for the Court of Claims to allow the amendment. Second, Defendants attempted to challenge that decision in a motion for peremptory reversal in the Court of Appeals, which was denied, and failed to raise it as an issue in their appellate brief. As a result, the Court of Appeals correctly found the issue to have been abandoned. (COA Op at 6 n 5).

was no actual controversy before the Court. Now, more than two years later, the statute has been the subject of a full-blown constitutional challenge under Const 1963, art 8, § 2—one which has resulted in two of the four Court of Appeals judges who have reviewed it (Judges Gleicher and Stephens (sitting as the Court of Claims)) finding MCL 388.1752b to be unconstitutional because it provides public funding to private schools.

Defendants next cite the Court of Appeals' decision to remand the case for consideration of Plaintiffs' claim that MCL 388.1752b also violates Const 1963, art 4, § 30's requirement that an expenditure of public money for private purposes be approved by a two-thirds majority vote in both houses of the Legislature. Defendants speculate that "[r]esolution of this constitutional issue may obviate any further review of the statute's viability" (Defs' Op Br at 14), but that is not a good reason to decline review of Plaintiffs' art 8, § 2 challenge. A violation of art 4, § 30 can be remedied by passing the statute with the requisite two-thirds majority vote, in which case the art 8, § 2 issue would remain. That issue has already been fully briefed and argued before both the Court of Claims and the Court of Appeals, and is ripe for the Court's review notwithstanding the possibility that MCL 388.1752b may *also* violate art 4, § 30.

Finally, Defendants suggest that the Court should await the "mandate by mandate" review ordered by the Court of Appeals majority. (Defs' Op Br at 14-15). But that assumes—incorrectly—that the majority's "test" comports with art 8, § 2 and this Court's decisions in *Traverse City Sch Dist v Attorney General*, 384 Mich 390; 185 NW2d 9 (1971), and *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41; 228 NW2d 772 (1975). As discussed in Plaintiffs' application, and further below, the Court of Appeals majority fundamentally erred in its interpretation of art 8, § 2's prohibition against public funding of

private schools. A "mandate by mandate" review will not assist the Court, eliminate the need for review, or resolve the controversy.

Indeed, the Court of Appeals majority, applying its new test, has already concluded that MCL 388.1752's public funding of numerous mandates will not violate art 8, § 2. (Compare COA Op at 13-14 (applying the new test to the funding of three mandates and finding no violation of art 8, § 2) with COA Concurrence/Dissent at 7-8 (explaining why funding the three mandates chosen by the majority violates art 8, § 2)). And once any state payments are made to private schools, there is no provision for clawing them back. Therefore, in order to prevent an irreversible violation of art 8, § 2, this Court's review is needed now.

B. Plaintiffs are not asking the Court to "overturn nearly fifty years of established precedent."

Contrary to Defendants' assertion, Plaintiffs have never suggested, let alone argued for, an "overrul[ing]" of *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*. Nor have Plaintiffs asked the Court to adopt the "'no benefits, primary or incidental' rule" that this Court first rejected in *Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich 82, 104; 180 NW2d 65 (1970). In that case, the Court was rightly concerned about avoiding an interpretation of the state constitution that would render parochial schools "completely ineligible for all [s]tate services," *id.*, but that is not what Plaintiffs, the Court of Claims, or the Court of Appeals dissent are advocating.

The fact of the matter is this: Article 8, § 2 expressly prohibits the public funding of private schools, including subsidizing their employees' wages, yet that is precisely what MCL 388.1752b does by appropriating millions of dollars specifically to reimburse private schools a portion of their operational costs. And despite Defendants' spurious assertion, applying art 8, § 2 as written would not "render nonpublic schools outlaws, unable to assert a claim in state court,

register a deed, receive public utilities, or rely on basic police and fire protection." (Defs' Opp Br at 17). Recognizing that art 8, § 2 bars direct financial aid to private schools has nothing to do with whether the Michigan State Police can respond to "a call about an active shooter at a nonpublic school," whether a fire department can use public "water" to fight a fire at a nonpublic school, or whether nonpublic schools—like any other business in Michigan—can obtain "everyday services like public water hookups, public sewer hookups, public light along the sidewalk, and repairs to public roads that lead to the[ir] entrance or parking lot." (*Id*. at 17-18). As Defendants know full well, generally applicable public services that incidentally benefit nonpublic schools are not the sort of "aid" with which art 8, § 2 is concerned, and Plaintiffs have never suggested otherwise.[2]

C. Defendants (and the Court of Appeals majority) misunderstand the line this Court has drawn between permissible and impermissible aid.

In arguing that the appropriations under MCL 388.1752b do not constitute impermissible "aid" to nonpublic schools, Defendants badly misread this Court's decisions in *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242.* Those decisions do not hold that direct funding of private schools, such as that for which MCL 388.1752b provides, is permitted so long as such "aid" does not relate to "instruction."

As the Court of Appeals dissent properly recognized, this Court in *Traverse City Sch Dist* "took great pains to draw a constitutional line between services provided to nonpublic schools funded by public dollars—forbidden under Proposal C—and those offered to nonpublic school

[2] Defendants even go so far as to claim that applying art 8, § 2's plain text—the best evidence of its "common understanding"—would "arguably prevent the Legislature from imposing any mandate" requiring private schools to provide a "safe, wholesome, and healthy learning environment" since "publicly funded oversight" would be required to ensure that they are in compliance. (Defs' Opp Br at 19). The Court should not even begin to entertain such twisted and tortured logic.

students but funded entirely through payments to *public* schools." (COA Concurrence/Dissent at 4 (emphasis in original)). It did so by repeatedly focusing on the element of "control," which is key to distinguishing between aid "that is a 'primary' element of the support and maintenance of a private school" and that which is "only 'incidental' to the private schools[']support and maintenance." *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 48 n 2, citing *Traverse City Sch Dist*, 384 Mich at 413.

Applying this distinction to "shared time" instruction, this Court explained that "shared time at a nonpublic school provides only incidental aid" because such a program is "under the complete control of the public school district." *Traverse City Sch Dist*, 384 Mich at 414, 416. In such programs, the state provides instruction to children directly; any benefit to the nonpublic school itself is entirely incidental. For that same reason, "shared time" did not "support . . . the employment of any person at any such nonpublic school" because it only provided for "the employment of *public* school teachers." *Id.* at 416 (emphasis added). The fact that those teachers were to "perform some or all of their services" at a nonpublic school did not "alter the location of their employment" because the work would be performed "under such conditions of control as a public school." *Id.* Finally, to the extent that "non-instructional public school employees" were to make even "regular visitations" to a nonpublic school, the Court found that such visitations would not be improper provided that they are "not so extensive as to constitute the nonpublic school as the regular and usual work station of the public school employees." *Id.*

Similarly, this element of control was critical to the Court's approval of "the provision of auxiliary services . . . to nonpublic school students at any nonpublic school." *Id.* at 417. As with shared time, the state provides auxiliary services to children directly; any benefit to the nonpublic school itself is incidental. Defendants myopically focus on the Court's

characterization of these "general health and safety measures" as being "incidental" to instruction, *id*. at 418, but what is also critical is that they are state services directly provided to children, not aid or maintenance to the nonpublic schools. Thus, the Court emphasized that the auxiliary services at issue were "performed by public employees under the exclusive direction of public authorities." *Id*. This control is what distinguishes the auxiliary services for children that the Court approved in *Traverse City Sch Dist* from MCL 388.1752b's direct funding mechanism. In arguing that providing funds directly to private schools is permissible to the extent that they are not "used to run instructional programs" (Defs' Op Br at 22), Defendants completely ignore the requirement of "control" that the *Traverse City Sch Dist* Court found to be pivotal to its decision.

Defendants also misconstrue the Court's observation in *Traverse City Sch Dist* that it did not consider art 8, § 2's "prohibition against public expenditures to support the employment of persons at nonpublic schools to include policemen, firemen, nurses, counsellors and other persons engaged in governmental, health and general welfare activities." *Traverse City Sch Dist*, 384 Mich at 420. Defendants read this to mean that the state can actually pay the salaries of private school employees who are not involved in the "instructional process itself." (Defs' Op Br at 22-23). But the Court's discussion of employment was integral to its holding regarding the "auxiliary services" at issue in *Traverse City Sch Dist*: such services were approved because they were provided by "public employees under the exclusive direction of public authorities," not employees of the nonpublic schools or acting under the nonpublic schools' direction. *Traverse City Sch Dist*, 384 Mich at 420. The Court also stressed how "the prohibitions of Proposal C . . . are keyed into prohibiting the passage of public funds into private school hands for purposes of running the private school operation," which does not occur with auxiliary

services. *Id*. at 420-421. And interpreting art 8, § 2 as prohibiting such services, the Court explained, "would place nonpublic schools outside of the sovereign jurisdiction of the State of Michigan." *Id*. at 421.

The point the Court was making was simple: Const 1963, art 8, § 2 cannot reasonably be read to prohibit public employees from providing the kinds of governmental, health, and general welfare services that are provided to the public at large (i.e., police and fire protection) whenever doing so might incidentally benefit a nonpublic school. That is a far cry from what Defendants are asserting, which is that the state can pay the wages of private school employees who assist in the schools' operation so long as they are not teachers.[3] If that was really what the *Traverse City Sch Dist* Court meant, it would not have cautioned against the need to ensure that even "*non-instructional* public school employees" do not spend so much time working at a nonpublic school that it becomes their "regular and usual work station." *Traverse City Sch Dist*, 384 Mich at 416 (emphasis added).

Finally, Defendants completely miss the point of *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41. There, the Court compared the shared time and auxiliary services at issue in *Traverse City Sch Dist* with supplying textbooks and school supplies. Defendants assert

[3] In addition to the fact that no such holding can be found in *Traverse City Sch Dist*, reimbursement of private school employees' salaries is flatly prohibited by the plain text of art 8, § 2 as written and ratified by the voters, forbidding any "payment . . . to support the . . . employment of any person at any . . . nonpublic school . . . ." "[I]n analyzing constitutional language, the first inquiry is to determine if the words have a plain meaning or are obvious on their face." *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 375; 663 NW2d 436 (2003). The Court "typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification." *Wayne Co v Hathcock*, 471 Mich 445, 468–469; 684 NW2d 765 (2004). The plain meaning of the terms "payment . . . to support the . . . employment of any person at any . . . nonpublic school" is clear and obvious on its face: it plainly prohibits the state from providing payment to a nonpublic school that will be used to support the employment of a person by that school, regardless of the purpose (instructional or non-instructional) of the employment.

that the line the Court drew was an "educational" one, but the Court's decision was not so narrow. On the contrary, the Court expressly held that "[h]owever Proposal C is to be construed . . . if the will of the electorate is to be respected it must be read to bar public funding for primary and essential elements of a private school's existence." *Id*. at 49. As both the Court of Claims and Court of Appeals dissent appropriately recognized, statutory mandates that must be met in order for a private school (or any school) to operate are, by definition, "primary and essential elements of [the school's] existence." As a result, public funds cannot be used to "aid" private schools in complying with them. Far from being a "simplistic analysis" as Defendants claim, it is the analysis compelled by both the text of art 8, § 2 and this Court's precedents.

III. CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, and as further discussed in their application, Plaintiffs respectfully request that this Court grant leave to appeal the Court of Appeals majority's decision upholding the constitutionality of MCL 388.1752b. In the alternative, Plaintiffs request that the Court enter a peremptory order reversing the Court of Appeals' decision and reinstating the Court of Claims' decision finding MCL 388.1752b to violate Const 1963, art 8, § 2.

Respectfully submitted,

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